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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. ——
79-1839

FREDERICK JOHN FAZIO AND JOSEPH HENRY CUSANELLI,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Frederick John Fazio and Joseph Henry Cusanelli pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, affirming their convictions in the United States District Court for the Southern District of Georgia for possession of marijuana with intent to distribute and conspiracy to possess marijuana.

OPINIONS BELOW

The opinion of the court of appeals, reported as *United States* v. *Butler,* 611 F.2d 1066 (5th Cir. 1980), and an unreported amendment thereto on denial of rehearing, are reprinted in the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1980. A timely petition for rehearing was denied on April 18, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In the absence of exigent circumstances, does not the fourth amendment prohibit police from making a warrantless and nonconsensual entry into a private residence to make an arrest?

STATEMENT OF THE CASE

This case involves warrantless arrests of several persons in and around a private residence. The eight-acre residence, West Point Plantation, is on the northern edge of St. Simons Island near Brunswick, Georgia. The warrantless arrests were orchestrated by Drug Enforcement Administration Special Agent Kelly Goodowens, the only witness at the suppression hearing below. The transcript of his testimony consists of seventy-eight pages.

The Plantation was rented by two of the defendants, not petitioners, below. It fronts the Frederica River, providing northern and southern access to the intercoastal waterway. The property is heavily wooded and substantially protected by an electrified fence. The only access to the property by land is a single, half-mile dirt road. S. 52, 62, 85, 87.[1]

By approximately nine o'clock on the evening of July 28, 1978, circumstances had led Agent Good-

[1] Citations to the Suppression Hearing are abbreviated as S. —.

owens to place the property under heavy physical surveillance.

Earlier in the week, local officer Starling had observed an unfamiliar high-powered pleasure boat in the waterways near the Plantation, sometimes late at night. S. 33-40. He saw the boat operators, two defendants below, change nearby motel accommodations three times during the week. *Id.* He watched the boat operators having dinner with petitioners Fazio and Cusanelli at one of the motels and saw petitioner Fazio in a tractor-trailer parked at the motel. Officer Starling contacted Agent Goodowens and at eight o'clock on July 28 the tractor-trailer and pleasure boat were followed to the Plantation. S. 49, 55.

Agent Goodowens quickly compiled an extensive physical surveillance team. Agents were stationed in boats on the Frederica River north and south of the Plantation, the only access by water. S. 62, 87. Another team of officers established themselves at the mouth of the only road. *Id.* Other agents were stationed on nearby property. Agent Goodowens and Officer Starling stood on the corner of adjoining property. The Plantation's dock, some five hundred feet away, was in view. Agent Goodowens maintained instant communication with the entire team through a circling, radio-equipped airplane. S. 89-90, 100, 102-104.

When darkness fell, Agent Goodowens observed, through night goggles, the high-powered pleasure boat and a large shrimp boat docked at the Plantation. S. 40, 54, 58. Several men started offloading bundles from the shrimp boat onto the dock. S. 78. Agent Goodowens testified that he soon determined, based on his experience, that the bundles were bales of marijuana. S. 56,

96-7. All the officers maintained their position and observed the continuous offload operation for five hours. S. 56, 81.

Early in the evening Agent Goodowens made the decision to initiate the arrests only when one of the vehicles on the Plantation started to move. S. 61. He testified he had all the information which formed the basis of the arrests by at least 10:30 p.m., S. 84, 97, but did not apply for a warrant because he was not sure when a vehicle would start to move. S. 94.

At 2:30 a.m., a pickup truck started and Agent Goodowens gave the arrest order. S. 61. Officers converged on the house, curtilage and vehicles, and ten arrests were made. Petitioner Fazio was seized in a bedroom in the house where he was asleep.

At 4:00 a.m., Agent Goodowens telephoned a nearby United States magistrate from the Plantation then drove to her home and, by 7:10 a.m., had secured four search warrants for the home, its curtilage, the vehicles and nearby motel rooms. Bales of marijuana and other evidence were seized. Petitioner Cusanelli was found under the dock at the Plantation during the execution of the warrants.

The district court denied a motion to suppress. The court of appeals affirmed.

REASONS FOR GRANTING THE WRIT

As the statement of facts reveals, a combined state and federal force surveilled, then surrounded, then forcibly entered the grounds of a home in Georgia. They continued across the grounds, seizing all the

civilians in sight, and into the house itself, where petitioner Fazio was found asleep in a bedroom and seized. These minions of Agent Goodowens were in airplanes, police cars and watercraft. They had radios, telephones, night goggles, and guns. They were armed with everything—except a warrant, that one weapon which, absent special circumstances, grants the police access to places within the constitutional zone of privacy.

No ambiguity clouds the constitutional issue presented: not only would the impressive communications technology brought to the surveillance scene belie any assertion that the agents could not have reached a magistrate to make an appointment for a warrant application, but the record shows that once all the persons at the home and its surroundings were arrested, the agents did wake up a magistrate and obtain a search warrant.

The case presents a departure from the accepted and usual course of judicial proceedings, and an issue of federal law decided inconsistently with applicable decisions of this Court. S.Ct.R. 19.

United States v. *Watson,* 423 U.S. 411 (1976), upholding a warrantless arrest in a public place, and *Payton* v. *New York,* —— U.S. ——, 48 U.S.L.W. 4375 (April 15, 1980), condemning warrantless arrests in dwellings, provide the matrix within which the question presented will be decided. No lengthy exposition of these recent cases is necessary, particularly given the review in *Payton* of the law of warrantless arrest. *Id.,* 4376 at nn.1-4.

Payton recalls and gives life to the constitutional history of the warrant requirement.[2]

The opinion below may be explicable only by noting the date on which it was decided, February 14, 1980. The denial of rehearing was April 18, 1980, and *Payton* v. *New York, supra,* was decided April 15, 1980. *Payton* notes that the fifth circuit has traditionally permitted warrantless entry of a home to make an arrest. 48 U.S.L.W. at 4376, n.4. Although petitioners may be able to raise their fourth amendment claim on collateral attack, this is, we submit, a case in which the Court should consider, at a minimum, granting the writ and remanding in light of *Payton.*

The facts of this case, a fairly typical large-scale arrest in these days of federal-state cooperation and law enforcement technological sophistication, present, however, issues which would permit the Court to survey the ground between the arrest in a public place and that inside the threshold of a home.

Eight fenced acres with a house and outbuildings is not a "public place" like the restaurant in *Watson,* nor are all its square feet of lawn, garden, woods and docks constitutionally indistinguishable from a house or apartment like the premises in which Payton and Riddick were taken. Some of those seized, though not the petitioners, were on or near conveyances—trucks and boats—which might permit the invocation of spe-

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[2] The development, in this Court's jurisprudence, of a strong insistence upon the warrant requirement has been consistent. *See, e.g.'s, Lo-Ji Sales, Inc.* v. *New York,* 442 U.S. 319 (1979); *Mincey* v. *Arizona,* 437 U.S. 385 (1978); *Michigan* v. *Tyler,* 436 U.S. 499 (1978); *Marshall* v. *Barlow's Inc.,* 436 U.S. 307 (1978); *GM Leasing Corp.* v. *United States,* 429 U.S. 338 (1977).

cial rules. *See Chambers* v. *Maroney,* 399 U.S. 42 (1970).

The seizure of Fazio surely implicates the values held paramount in *Payton.* The case of Cusanelli provides an opportunity for the petitioners and the government to air, on a record fairly presenting the question, whether "threshold" and "dwelling" refer to the stuff of which houses are made or suggest a zone of privacy around the home which officers are generally forbidden to enter without a warrant.[3]

CONCLUSION

For all of these reasons, it is respectfully prayed that the writ of certiorari be granted. In the alternative, petitioners pray that the writ be granted, the judgment vacated and the cause remanded to the court of appeals for further consideration in light of *Payton* v. *New York, supra.*

Respectfully submitted,

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Dated: May 19, 1980

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[3] Candor compels the observation that this Court is not likely to disturb the findings of the lower courts that the arrests, searches and seizures were based on probable cause. *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271 (1949); *see, e.g., United States* v. *Ceccolini,* 435 U.S. 268, 273 (1978). However, should this Court grant review petitioners will request to brief and argue the matter since it would have to be decided if a majority of the Court finds no warrant was required here.

APPENDIX

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 78-5777

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SCOTT PAUL BUTLER, MICHAEL THOMAS SMITH, a/k/a THOMAS M. SMITH, GARRISON DORMINY BARNES, THOMAS RICHARD WINGATE, ROBERT RAYMOND BARNES, WILLIAM ARTHUR HISCOCK, JOHN RICHARD BARNES, JR., GEORGE GARY HOLDER, ROBERT TYLER MILNE, HUGH THOMAS MCCONAGHY, JOSEPH HENRY CUSANELLI, a/k/a WILLIAM JOSEPH and FREDERICK JOHN FAZIO, *Defendants-Appellants.*

February 14, 1980

James K. Jenkins, Atlanta, Ga., for Scott Paul Butler.

Steadman S. Stahl, Jr., Hollywood, Fla., for defendants-appellants.

Katherine L. Henry, William H. McAbee, Asst. U.S. Attys., Savannah, Ga., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Georgia

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

KRAVITCH, Circuit Judge.

Appellants, except Hugh Thomas McConaghy, were convicted in the Southern District of Georgia of conspiracy to possess marijuana, 21 U.S.C. § 846, and aiding and abetting each other in the possession of marijuana with the intent to distribute, 21 U.S.C. § 841(a)(1),[1] 18 U.S.C. § 2.

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[1] 21 U.S.C. § 841(a)(1) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or

McConaghy was convicted only of aiding and abetting. All appeal their convictions. We affirm.

I. Facts

This is another in the apparently unending procession of marijuana importation cases. On July 21, 1978, an officer of the Glynn County Police Department noticed three white males in a car, the rear of which was elevated. Upon later observing the car at the Ramada Inn, the officer became suspicious and began surveillance directed at the driver of the car (John Barnes) and others with whom he came into contact. Surveillance continued from July 21 to July 29 and culminated in the arrest of fourteen people.

On the night of Friday, July 28, a DEA agent conducting aerial surveillance observed a shrimp boat, an Aqua Sport boat which had been previously observed,[2] and a small

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intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[2] The Aqua Sport boat was first observed on July 21, parked at the Ramada Inn where John Barnes was registered. On July 23, John Barnes, Robert Barnes and two others took the Aqua Sport to a public landing where it was launched. The boat was then driven to St. Simons Island where it was docked. Later that afternoon, John and Robert Barnes left the marina in the boat, headed north on the Frederica River. The boat was discovered back at the marina the next morning. The West Point Plantation is located on the Frederica River.

On July 24, John and Robert Barnes again took the boat out and again headed north on the Frederica River. They stayed out approximately four hours. On July 25, the Barnes brothers took the boat out in the same direction for approximately the same length of time. The boat was next observed that night in the course of aerial surveillance docket at the West Point Plantation.

The next movement of the boat apparently occurred on July 28 in the early afternoon. John and Robert Barnes fueled the boat and returned it to its berth. It was launched at about 6:30, and again headed north.

cruise boat tied up at the dock of the West Point Plantation. Shortly thereafter, a tractor-trailer truck which also had been previously observed [3] arrived at the Plantation. The combination of the arrival of the tractor-trailer and the docking of the shrimp boat resulted in the Plantation being identified as the target area.

The Plantation was placed under tight surveillance. Kelly Goodowens, the DEA agent in charge, and Det. Starling, a Glynn County police officer, set up surveillance on a nearby dock.[4] Activities at the Plantation were observed by the officers through night goggles.[5] Other law enforcement officers were located along the only road into the Plantation, in the general area, and in boats on the waterways.

Through the night goggles the officers observed people carrying bundles which appeaed to be marijuana[6] from the shrimp boat onto the Plantation property. The observation continued until approximately 2:35 a.m. Goodowens testified he planned to initiate the arrests as soon as the

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[3] The tractor-trailer truck was first observed on July 27 at the Holiday Inn. It was seen leaving the Holiday Inn, going to the 8 Days Inn and then to the Best Western Motel in Eulonia, Georgia. George Holder and Frederick Fazio were in the tractor-trailer truck.

The truck left Eulonia on the afternoon of July 28 and was driven to the West Point Plantation. It arrived at approximately 7:00 p. m. Observed in the truck were Holder and Fazio. The trailer of the truck bore the label "Murray Van and Storage."

[4] The dock on which Goodowens and Starling were located is approximately 500 feet from the West Point Plantation dock. There is, however, an unobstructed view between the two docks.

[5] Night goggles amplify light, but do not magnify. Thus, despite the darkness of the night the agents were able to observe what transpired.

[6] Agent Goodowens testified, based on his prior experience with marijuana smuggling, that the packages being carried were packaged like marijuana typically is packaged.

vehicle started to move from the scene. At approximately 2:35 a.m., Goodowens heard a vehicle start and saw its brake lights come on. He gave the signal for the arrests. When he and Det. Starling arrived at the yard of the Plantation, they observed no activity. After a few minutes several individuals came out of the house and began moving bundles from the rear of the tractor-trailer into the house. The remainder of the arrest team arrived and the arrests were initiated.[1]

The visible marijuana was seized immediately and the house was secured. Goodowens then departed to obtain search warrants for the house, the vehicles and the hotel rooms occupied by the suspect's. He arrived at the magis-

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[1]

Defendant	*Place of Arrest*
Scott Paul Butler	on the shrimp boat docked at Plantation
Michael Thomas Smith	in front of the Plantation house
Garrison Dorminy Barnes	on the Plantation's dock
Thomas Richard Wingate	in basement of the Plantation house
Robert Raymond Barnes	cruise boat on the Frederica River south of Plantation, claimed to be fishing—no bait on boat
William Arthur Hiscock	on the shrimp boat docked at the Plantation
John Raymond McConaghy	on a road away from the Plantation
John Richard Barnes, Jr.	in Aqua Sport on Frederica River north of Plantation
George Gary Holder	on the road in front of the Plantation
Robert Tyler Milne	running from the basement of the Plantation
Hugh Thomas McConaghy	by the fence near the dock or under the dock
Joseph Henry Cusanelli	under the dock
Frederick John Fazio	inside house

trate's house at approximately 4:30 or 5:00 a.m.; the search warrants were signed at 7:10 a.m. and executed later in the morning.

A four count indictment was returned against all defendants charging them with conspiracy to possess marijuana, aiding and abetting each other in the possession of marijuana with the intent to distribute, conspiracy to import marijuana, and aiding and abetting each other in the importation of marijuana. At trial, a directed verdict of acquittal was entered on the importation counts. John Raymond McConaghy was acquitted on both remaining counts, and Hugh Thomas McConaghy was acquitted only of conspiracy to possess. All other defendants were convicted both of conspiracy to possess and aiding and abetting. All appeal their convictions.[8]

Four issues are presented on appeal: (1) whether the grand and petit juries were legally constituted; (2) whether the motion to suppress should have been granted; (3) whether Hugh Thomas McConaghy was entitled to a severance; and (4) whether the evidence is sufficient to sustain the guilty verdicts.

II. Issues

A. *Jury Challenges*

Appellants raise constitutional and statutory challenges to the grand and petit jury selection systems being used in the Southern District of Georgia. We find these challenges to be without merit.

Under *Duren v. Missouri*, 439 U.S. 357, 364, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979), in order to prove a prima facie

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[8] William Anthony McConaghy died on July 8, 1979, before this case was orally argued. Accordingly, his appeal in this matter was dismissed by order of the court.

violation of the fair cross-section requirement of the Sixth Amendment, the defendant must prove:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

The claims raised here are essentially identical to those raised in *United States v. Maskeny*, 609 F.2d 183 (5th Cir. 1980), which also involved challenges to the jury system in the Southern District of Georgia. Like the *Maskeny* court, we need not decide whether each of the groups which the appellants assert have been excluded are "distinctive groups" because we find they have failed to show a constitutionally impermissable disparity between the group's representation in the jury system and its representation in the population.[9] None of the disparities urged by the appellants are as great as the 10% disparity found not to present a case of purposeful discrimination in *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).[10] Like the *Maskeny* court, we decline to abandon the absolute disparity method for dealing with jury challenges. At 190.

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[9] The groups and the disparities as urged by the appellants are as follows:

Group	Absolute disparity between presence on jury wheel and presence in population
Non-white	8.69%
Service workers	5.71%
Youth (18-29 years old)	9.14%

[10] For a discussion of the interplay between jury claims decided on equal protection grounds (*Swain*) and those decided on sixth amendment grounds as are urged here, see *Maskeny*, at 190.

As in *Maskeny,* appellants contend there are violations of the National Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.* They argue the statute has been violated because: (1) a source of names in addition to voter registration lists was not used; (2) the one year district residency requirement is unconstitutional; (3) the ministerial exemption or its application violates the first amendment and the cross-section requirements; and (4) the clerk usurped the function of the district judge in excusing jurors in violation of the statute. All of these arguments were presented to the court in *Maskeny* and rejected. For the reasons fully discussed in *Maskeny,* 191-194, we hold there has been no statutory violation.

B. *Motion to Suppress*

The exact nature of appellants' contention is unclear. Apparently, they claim that the arresting officers acted without probable cause and that there were no exigent circumstances justifying the warrantless search, seizure of personalty and incidental arrests.

The problem with the appellants' contentions is that they are viewing the occurrences analytically backwards. The arrests were not incident to the search but rather the search was incident to the arrests.

Exigent circumstances are not constitutionally required to make a warrantless arrest. *United States v. Watson,* 423 U.S. 411, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976); *United States v. Campbell,* 575 F.2d 505 (5th Cir. 1978). Here, there is no question that probable cause existed when the arrests were made. Clearly, the facts and circumstances within the arresting officers' knowledge were sufficient to justify a reasonable person in the belief that an offense was being committed. *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). The collective

knowledge [11] of the investigating officers was that: a group of people arrived in the Brunswick area using aliases and exploring the area at odd hours, learning the land and water routes to a residence in a secluded setting, and bringing in boats and a moving van suitable for a smuggling operation. The chain of events on Friday supplied the additional information needed to transform merely suspicious circumstances into probable cause to believe a crime was being committed: the gathering of boats and motor vehicels around a darkened house at night, the stationing of lookouts on the river, the blocking of the entrance road and the unloading of objects which resembled marijuana bales from a shrimp boat. Thus, the arrests were founded on probable cause and the lack of a warrant is irrelevant.[12]

Once the police moved in to make the arrests, the seizure of marijuana was justifiable either as a "search 'incident to a lawful arrest'," *Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969), or as a "plain view" seizure, *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Under either theory the denial

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[11] Collective knowledge rather than the sole knowledge of any individual officer is the factor to be considered when determining the existence of probable cause. *United States v. Clark,* 559 F.2d 420 (5th Cir.), *cert. denied,* 434 U.S. 969, 98 S.Ct. 516, 54 L.Ed.2d 457 (1977).

[12] Equally irrelevant is the fact that the police did not make the arrests as soon as there was sufficient information to constitute probable cause. The police are under no obligation to make arrests as soon as probable cause exists, *Hoffa v. United States,* 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *United States v. Cravero,* 545 F.2d 406 (5th Cir. 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977); *Koran v. United States,* 469 F.2d 1071 (5th Cir. 1972).

If, however, the arrests had been incident to a warrantless search justified on the basis of exigent circumstances, the delay would have been more significant. *See United States v. Curran,* 498 F.2d 30, 34 (9th Cir. 1974).

of the motion to suppress was proper. Except for the "plain view" seizures made at the time of the arrests, all other searches and seizures were lawfully conducted pursuant to the search warrants subsequently obtained.

C. *Hugh Thomas McConaghy's Motion for Severance*

At the close of the Government's case, Hugh and John McConaghy moved for severance claiming they needed co-defendant William McConaghy to testify on their behalf. The motions were denied; John McConaghy was acquitted without the testimony.

In order to be entitled to a severance on the ground urged, the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed. *United States v. Rice,* 550 F.2d 1364 (5th Cir.), *cert. denied,* 434 U.S. 954, 98 S.Ct. 479, 54 L.Ed.2d 312 (1977); *United States v. Morrow,* 537 F.2d 120, 135 (5th Cir. 1976); *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970). Given such a showing, the court should (1) examine the significance of the testimony in relation to the defendant's theory of defense; (2) assess the extent of prejudice caused by the absence of the testimony; (3) pay close attention to judicial administration and economy; (4) give weight to the timeliness of the motion. *United States v. Rice,* 550 F.2d 1364 (5th Cir. 1977).

Considering Hugh McConaghy's motion under these criteria we hold that the court properly denied the motion for severance. The motion obviously was not timely as it was not made before the trial began and there was no showing that it was based on grounds not known prior to trial. Fed.R.Crim.P., Rule 12; *United States v. Spinella,* 506 F.2d 426 (5th Cir.), *cert. denied,* 423 U.S. 917, 96 S.Ct. 227, 46 L.Ed.2d 147 (1975). Furthermore, the significance

of the testimony as exculpatory evidence is not certain,[13] as it did not rise to the level of showing that Hugh McConaghy was not involved in the off-loading. The testimony was not so clearly exculpatory as to justify the judicial diseconomy occasioned by a severance in the middle of a trial. Finally, the need for the testimony is questionable as John McConaghy was acquitted without the testimony on the same defense theory utilized by Hugh McConaghy.

D. *Sufficiency of the Evidence*

All defendants challenge the sufficiency of the evidence both as to conspiracy and on the substantive count of possession.

1. Overview of the Evidence

The cumulative evidence collected by the DEA and local law enforcement officers revealed a number of people arriving in the Brunswick area, moving from one hotel to another in the same immediate vicinity, meeting with each other, scouting boat channels and ending up on a secluded plantation where 41,000 pounds of marijuana was off-loaded from a shrimp boat. While Agent Goodowens and Det. Starling observed the off-loading operation through night goggles, both candidly admitted they could not positively identify any individual as participating in the off-load as they could see only forms and not faces. The Government secured the area and arrested everyone present;

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[13] The defense proffer of the testimony showed William McConaghy would testify that brothers John and Hugh had arrived in the Brunswick area only to bring him (William) his jeep; Hugh had a back problem; when the flares went off to signify the onset of the arrests, William got Hugh from the bedroom of the house where he had been since early in the day (before the shrimp boat arrived) and together they hid under the dock. This would have controverted the testimony of the police to the limited extent that they testified Hugh McConaghy was arrested in the woods. (T-323).

the theory of the possession case was that everyone on the plantation property must have been involved in the offload. The theory of the Government on the conspiracy count was one of "presence plus" additional circumstances. *See e. g., United States v. Soto,* 591 F.2d 1091 (5th Cir.), *cert. denied,* —— U.S. ——, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States v. Sink,* 586 F.2d 1041 (5th Cir. 1978), *cert. denied,* —— U.S. ——, 99 S.Ct. 3102, 61 L.Ed. 2d 876 (1979).

2. Is the Evidence Sufficient?

a. *Conspiracy Count*

In reviewing the sufficiency of the evidence, the appellate court must view the trial evidence in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), but must reverse the verdicts if reasonable minds must have had a reasonable doubt as to the existence of the essential elements of the crime charged. *United States v. Barrera,* 547 F.2d 1250, 1255 (5th Cir. 1977); *United States v. Reynolds,* 511 F.2d 603 (5th Cir. 1975).

In this case, as in many conspiracy cases, there is no direct, conclusive evidence of a conspiracy. There is substantial circumstantial evidence, however, that a conspiracy existed, that the appellants had knowledge of it, and with that knowledge they acted in furtherance of the conspiracy. *United States v. Soto,* 591 F.2d 1091, 1101 (5th Cir.), *cert. denied,* —— U.S. ——, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States v. Garza,* 574 F.2d 298, 304 (5th Cir. 1978); *United States v. Duckett,* 550 F.2d 1027, 1030 (5th Cir. 1977).

The circumstantial evidence of a conspiracy includes the following: (1) a mid-week meeting at the Holiday Inn attended by John Barnes, Robert Barnes, Fazio, Holder, William McConaghy and Cusanelli; (2) the scouting of the

waterways several days before the off-load occurred; (3) the leasing of a secluded plantation; (4) the placing of guards on the river; and (5) the arrival of the shrimp boat, tractor-trailer truck and defendants at the Plantation on the same night. The totality of the circumstantial evidence indicates a well-orchestrated criminal conspiracy to possess marijuana.

Given the existence of a conspiracy, each appellant's participation in the crime must be established by evidence which a jury could conclude rules out any reasonable hypothesis of innocence. *United States v. Soto, supra* at 1102; *United States v. Alvarez,* 548 F.2d 542, 544 (5th Cir. 1977).

John and Robert Barnes acted as river lookouts on the night of the off-load, or at least the jury could so conclude. That, in combination with their apparent "scouting" of the waterways and presence at the Wednesday meeting at the Holiday Inn is sufficient evidence from which a jury could conclude the Barnes were a part of the conspiracy.

Evidence of appellant Holder's participation in the conspiracy may be found in his presence at the Wednesday meeting, the fact that many bales of marijuana were loaded on to his truck, and that he drove his truck to the Plantation on Friday. Appellant Fazio was also at the Holiday Inn meeting and accompanied Holder in his truck to the Plantation on Friday. Appellants Smith and Wingate together leased the Plantation and purchased one of the boats involved in the operation. They both were present at the scene of the off-load. Cusanelli was at the Wednesday meeting, at the Plantation on the night of the off-load, and possessed large amounts of cash and false identification papers. Hiscock was present when the shrimp boat was purchased and identified himself at that time as her intended captain. He was in possession of a large amount of cash and was arrested on the shrimp boat which was loaded with marijuana. Butler also was arrested on the shrimp boat and the evidence suggested he was a crew member

(prescription bottles bearing his name were found in the crew cabin which appeared to have someone living in it).

Appellants Garrison Barnes' and Milne's presence at the Plantation, in a secluded area of the island at night, in the midst of the unloaded marijuana and wearing T-shirts bearing the name "Murray Van and Storage," clearly connects them to the conspiring group.[14] Moreover, Milne was seen running from the basement just after the flare signifying the beginning of the arrests had been fired.

There is ample evidence, viewing each appellant's conduct in the context of the overall conspiracy, to connect them beyond a reasonable doubt to the proven conspiracy. *See e. g., United States v. Soto,* 591 F.2d 1091, 1102-03 (5th Cir.), *cert. denied,* —— U.S. ——, 99 S.Ct. 2862, 61 L.Ed. 2d 298 (1979).

b. *Possession*

As to the appellants discussed above, the evidence is also sufficient to support the possession convictions. For the most part the evidence which connects the defendants to the conspiracy also supports a finding that they aided and abetted others in the possession. *United States v. Soto, supra* at 1103.

The appellants who were arrested on the Plantation property (Fazio, Smith, Wingate, Cusanelli, Barnes and Milne) and on board the shrimp boat (Hiscock and Butler) all had marijuana sufficiently within their control to be in

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[14] The trailer into which the marijuana had been loaded also bore the label "Murray Van and Storage." Appellants Smith and Wingate and deceased appellant William McConaghy were wearing dark blue Murray Van and Storage T-shirts, also.

There is no mention in the record of how Garrison Barnes and Milne arrived at the Plantation. The jury could have reasonably concluded that they arrived either on the shrimp boat or in the trailer of the truck, as they obviously arrived before the DEA surveillance or their arrival would have been noticed.

constructive possession. *See United States v. Riggins,* 563 F.2d 1264, 1266 (5th Cir. 1977), *cert. denied,* 439 U.S. 848, 99 S.Ct. 148, 58 L.E.2d 150 (1978). The amount of marijuana possessed in sufficient to permit the jury to infer an intent to distribute. *United States v. Raffo,* 587 F.2d 199 (5th Cir. 1979). The evidence against appellants John and Robert Barnes, while not placing them on the Plantation property, supports a finding that they were acting as river lookouts, and hence were aiding and abetting the others in the off-load operation. Appellant Holder was arrested on the road in front of the Plantation shortly after the other arrests were made and after the area had otherwise been secured. The evidence was sufficient to sustain an inference that he had slipped by the police in the initial confusion, but had been on the Plantation property, and thus in constructive, if not actual, possession of marijuana.

There is also sufficient evidence to sustain the conviction of Hugh McConaghy. Identification papers and personal belongings of Hugh McConaghy were found inside the Plantation house. He was arrested either from under the dock or by a fence near the dock at about 8:00 a.m. on Saturday.[15]

McConaghy took the stand in his own behalf and testified he had nothing to do with the marijuana, had no knowledge that an off-load was going to occur that night and disclaimed any possessory interest in the marijuana. He indicated he had previously injured his back in a work accident, that his back had begun to hurt early Friday afternoon and that he had gone into the bedroom to lie down. He and John McConaghy, his younger brother, heard arguing. John left but Hugh did not because of his back. The next thing he remembers after John left (he slept intermittently all day) was the sky lighting up. William

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[15] The police testified he was arrested from beside the fence near the dock; McConaghy testified he was arrested from under the dock.

McConaghy came to the bedroom and told Hugh to follow him. They then hid under the dock until they were arrested. John McConaghy, who was acquitted, corroborated Hugh's story up to the point when he (John) left the Plantation.

The jury was presented with a classic credibility choice. Inasmuch as John McConaghy was acquitted we must conclude they believed him to a certain extent. That does not mean, however, that they had to believe his testimony about Hugh. Construing the evidence in the light most favorable to the Government, *Glasser v. United States,* 315 U.S. 60, 62 S.St. 457, 86 L.Ed. 680 (1942), we cannot say there is insufficient evidence to sustain the conviction of Hugh McConaghy.

AFFIRMED.

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 78-5777

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

SCOTT PAUL BUTLER, MICHAEL THOMAS SMITH, a/k/a THOMAS M. SMITH, GARRISON DOMINY BARNES, THOMAS RICHARD WINGATE, ROBERT RAYMOND BARNES, WILLIAM ARTHUR HISCOCK, JOHN RICHARD BARNES, JR., GEORGE GARY HOLDER, ROBERT TYLER MILNE, HUGH THOMAS MCCONAGHY, JOSEPH HENRY CUSANELLI, a/k/a WILLIAM JOSEPH, and FREDERICK JOHN FAZIO, *Defendants-Appellants.*

SLIP OPINION

April 18, 1980.

Appeals from the United States District Court for the Southern District of Georgia

(FOR BUTLER)

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(FOR ALL OTHERS)

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On Petitions for Rehearing and Petition for Rehearing En Banc

(Opinion February 14, 1980, 5 Cir., 1980, 611 F.2d 1066)

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

PER CURIAM:

The only contention made by appellants in their Petitions for Rehearing and Rehearing En Banc which merits discussion is Scott Paul Butler's argument that the panel erred in stating that he was arrested on the shrimp boat. He asserts that because he was not arrested on the boat that there is insufficient evidence to sustain his conviction. We must disagree. Although at the time of the arrest Butler was at the end of the dock by the shrimp boat rather than on the boat (as stated in the opinion), his personal belongings, including a prescription drug bottle, were found on the boat. That connects him to the instrumentality which the jury could well infer brought the mariquana to the Plantation, thus giving him sufficient connections to the conspiring group to sustain his conspiracy conviction, and sufficient relationship to the marijuana to sustain his conviction for aiding and abetting the possession of marijuana. Moreover, the fact that he was dressed differently from several of the other conspirators (he was wearing a white shirt and overalls) does not lessen his connection to the shrimp boat.

We also wish to clarify a statement made in the opinion in this case. In discussing the appellant's jury challenges, we stated: "Like the Maskeny [United States v. Maskeny, 609 F.2d 183 (5th Cir. 1980)] court, we decline to abandon the absolute disparity method for dealing with jury challenges." Butler, at 1070. We did not wish to imply that the absolute disparity method is the sole means of establishing unlawful jury discrimination. However, given the small absolute disparities proven and the fact that a "less-

than-10% minority" was not at issue, we did not feel consideration of other statistical methods was necessary in this case.

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Petition for Rehearing En Banc is denied.

Supreme Court, U. S.
FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

No. 79-1839

In the Supreme Court of the United States

OCTOBER TERM, 1979

FREDERICK JOHN FAZIO AND JOSEPH HENRY CUSANELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether police officers, who had observed petitioners unloading marijuana at an eight-acre private estate, violated petitioners' Fourth Amendment rights by entering the grounds and building of the estate and arresting petitioners without a warrant.

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OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 1a-15a) is reported at 611 F. 2d 1066. The supplemental opinion of the court of appeals (Pet. App. 16a-18a) is reported at 615 F. 2d 685.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1980. A petition for rehearing was denied on April 18, 1980. The petition for a writ of certiorari was filed on May 19, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Georgia, petitioners were convicted of conspiracy to possess marijuana (21 U.S.C. 846) and aiding and abetting in the possession of marijuana with the intent to distribute it (21 U.S.C. 841(a)(1) and 18 U.S.C. 2).[1] Petitioner Cusanelli was sentenced to a term of five years' imprisonment; petitioner Fazio was sentenced to four years' imprisonment. The court of appeals affirmed (Pet. App. 1a-15a).

The circumstances leading to petitioners' arrests are fully described in the opinion below. On July 21, 1978, a county police sergeant began intermittent surveillance of a Buick Rivera and its driver, who was later identified as co-defendant John Barnes, as well as a 19 foot "Aqua

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[1]Petitioners were tried together with 12 co-defendants: Scott Butler, Michael Smith, Garrison Barnes, Robert Barnes, John Barnes, Jr., Thomas Wingate, William Hiscock, George Holder, Robert Milne, William McConaghy, Hugh McConaghy and John McConaghy. John McConaghy was acquitted on all counts; the remaining defendants, whose convictions were affirmed on appeal, have not joined in this petition.

Sport" boat that was parked at a Ramada Inn motel near Brunswick, Georgia (S.H. 34). On July 23, co-defendant Robert Barnes joined John Barnes, his brother, and two other co-defendants at the Ramada Inn (S.H. 35-36). The four men transported the boat from the motel to a public landing on the mainland, where they launched the boat and proceeded by water to the nearby St. Simons Island Marina (S.H. 35-36). Later that afternoon the two brothers left the marina in the boat, proceeding north on the Frederica River. They returned to the marina that night. After the boat had made the same trip twice more in the following two days, the county police sergeant contacted the Drug Enforcement Administration, which then joined in the surveillance (S.H. 37). On July 25, a DEA agent flying over the area observed the boat while it was docked at West Point Plantation, a private estate on St. Simons Island that was then being rented by co-defendants Michael Smith and Thomas Wingate.[2]

Meanwhile, on July 24, the Barnes brothers, who had checked into the Ramada Inn on July 20 (S.H. 34), moved directly across the street to a Howard Johnson's Motel (S.H. 35). On July 26, the Barnes brothers went to a Holiday Inn at the same intersection, where they had dinner with petitioners and two other co-defendants who were staying there (S.H. 44-45). The Barnes brothers changed hotels again on July 27, when they moved to a Sheraton Inn that was also located at the same intersection (S.H. 35). On the same day, petitioner Cusanelli was observed packing a jeep at the Holiday Inn, and petitioner Fazio and another co-defendant left the Holiday Inn and proceeded north to Eulonia, Georgia, in a large tractor-trailer truck (S.H. 46-47).

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[2] The estate, which consists of eight acres, is enclosed by a fence on three sides; it is bounded by the Frederica River on the fourth side. The property is accessible by only one road (S.H. 52, 84, 86-88).

The arrest took place on July 28. At about 6:00 p.m., the Barnes brothers launched the Aqua Sport from the St. Simons Marina and headed north on the Frederica River (S.H. 40). At 7:00 p.m., petitioner Fazio arrived with the tractor-trailer truck at the West Point Plantation on St. Simons Island (S.H. 48-49). Agents also saw the jeep crossing over to the island. From the air, another DEA agent observed the Aqua Sport and a shrimp boat at the plantation dock. Shortly after the tractor-trailer arrived, the Aqua Sport sped north up the river (S.H. 40, 50). Although night was falling, none of the plantation's lights was illuminated (S.H. 83).

At about 9:30 p.m., DEA agents and local police set up surveillance of the plantation from a nearby dock and property, from which they observed the plantation through light amplifying "night goggles" (S.H. 58). An arrest team was also posted along the road leading to the plantation, and boats were stationed in the river to observe possible activities there (S.H. 62, 88-89). From their vantage point, agents observed people transferring bundles, which appeared to contain marijuana, from the shrimp boat to the dock, and then to land near the tractor-trailer (S.H. 55, 57).

At this point, the officers had not yet deduced the pattern of the operation. Because the officers had observed the Aqua Sport leave the dock earlier and go north, they speculated that the boat might have gone to meet and return with another shrimp boat carrying more marijuana (S.H. 94-95). They had no idea when the tractor-trailer might leave the area. At approximately 2:30 a.m. agents heard the starting of an engine, which they later determined to be that of a pickup truck, and they saw the brake lights of a vehicle go on (S.H. 61). The DEA agent in charge then decided that the loading

operation must have been completed and that the truck loaded with marijuana was ready to leave. Consequently, he ordered the agents to enter the property and make arrests. As the officers moved closer to the plantation house, people came out of the house and began carrying bundles of marijuana from stacks near the truck into the basement of the house (S.H. 64). Arrests were then made, and the house was secured. Petitioner Fazio was arrested in a bedroom of the house; petitioner Cusanelli was found under the dock.

After the arrests, agents seized 191 bales of marijuana that were in plain view on the ground near the truck and the dock. The agent in charge then obtained search warrants for the house, the vehicles and the hotel rooms (S.H. 72-73; Tr. 394). The execution of those warrants resulted in the seizure of an additional 661 bales of marijuana and other evidence (S.H. 68, 93).

ARGUMENT

Petitioners contend that their warrantless arrests were unlawful under *Payton* v. *New York,* No. 78-5420 (Apr. 15, 1980). Petitioner Fazio argues that the officers' warrantless entry of the house violated his expectation of privacy even if the officers had probable cause to enter the plantation and arrest his co-defendants. Although petitioner Cusanelli was arrested at the plantation's dock, rather than in the house, he contends that his arrest was likewise illegal because the dock was part of the zone of privacy surrounding the house and its curtilage.

At the outset, we note that petitioners had no right to avoid trial even if the arrests were illegal; their remedy is clearly limited to the suppression of any evidence that might have resulted from the arrests. See *Payton* v. *New York, supra,* slip op. 18 n.34; *United States* v. *Crews,* No. 78-777 (Mar. 25, 1980); *Frisbie* v. *Collins,* 342 U.S. 519,

522 (1952). Petitioners, however, do not and cannot point to any evidence that was seized pursuant to their arrests.

Fazio, of course, was arrested while the officers were securing a house that they knew through their own observations to contain marijuana. It is undisputed, however, that no evidence was seized from the house at the time of Fazio's arrest. Only after a search warrant had been procured did the officers seize the marijuana that they had observed being placed in the basement. Petitioners have no basis for seeking suppression of evidence seized at the house pursuant to a valid warrant based on a showing of probable cause that was independent of any observations made inside the house.[3]

Likewise, petitioner Cusanelli has no basis for complaint because the bales of marijuana that were seized in plain view were not the product of his arrest. From a place where the agents were entitled to be, they observed the movement of bales of marijuana by Cusanelli and his co-defendants, who were in public view. See *United States* v. *Watson,* 423 U.S. 411 (1976). Cusanelli had no legitimate expectation of privacy in the plantation grounds where he was visible to public view. *United States* v. *Santana,* 427 U.S. 38, 42-43 (1976). Therefore, the officers' warrantless entry to arrest Cusanelli was appropriate under *Watson,* and the seizure of evidence

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[3]In any event, it is questionable that petitioners' mere presence on the property created any interest protected by the Fourth Amendment in these circumstances. See *Rakas* v. *Illinois,* 439 U.S. 128 (1978).

observed in plain view on the dock was valid. See *Coolidge* v. *New Hampshire,* 403 U.S. 443, 465 (1971).

Finally, the exigent circumstances surrounding the unloading operation justified the warrantless entry in any event. See *Payton* v. *New York, supra,* slip op. 10. Officers conducting surveillance of the estate observed the smugglers unloading the marijuana from the boat, but they had no idea when the truck might leave or the smugglers might disperse. When they observed the Aqua Sport proceed up the river again, they assumed that it had gone to meet another shrimp boat with more marijuana. In that case, the tractor-trailer might have stayed on the estate for several more hours or even days, and more smugglers might have arrived with more marijuana. Not until the officers heard the sound of a truck engine did they conclude that the loading operation was completed and that the smugglers were probably beginning to escape from the area. See *Dorman* v. *United States,* 435 F. 2d 385, 392-393 (D.C. Cir. 1970); *United States* v. *Kulcsar,* 586 F. 2d 1283, 1287 (8th Cir. 1978). In these circumstances, a warrantless entry was necessary to prevent the smugglers from escaping under cover of darkness, and, as the district court aptly noted, the officer in charge would have been "derelict in his duties" if he had not acted as he did (S.H. 122).[4]

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[4]Moreover, the Fifth Circuit had held prior to *Payton* that warrantless arrests in the home were permissible. See *United States* v. *Williams,* 573 F. 2d 348 (5th Cir. 1978). Thus, there is no suggestion here that the officers acted in bad faith or in knowing disregard of petitioners' constitutional rights. Consequently, the purpose of the exclusionary rule would not be served by applying *Payton* retroactively in this case even if that holding were applicable in these circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

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